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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re K.S., a Person Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

BENJAMIN G.,

Defendant and Appellant.

G047037

(Super. Ct. No. DP020051)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kimberly Menninger, Judge. Affirmed.

Megan Tukat Schirn, under appointment by the Court of Appeal, for
Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen, and Aurelio Torre, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

I

Benjamin G. (Father) appeals from the termination of his parental rights of his now two-year-old daughter K.S., at the permanency planning hearing held pursuant to Welfare and Institutions Code section 366.26 (hereafter referred to as the permanency planning hearing).¹ K.S.'s mother's (Mother's) parental rights were also terminated but she did not appeal. Father asserts the trial court erred in failing to apply the exception to termination found in section 366.26, subdivision (c)(1)(B)(i), or it should have granted his section 388 modification petition (hereafter 388 petition) requesting placement or additional services. We conclude Father's contentions lack merit, and we affirm the judgment.

II

When K.S. was born in July 2010, she and Mother tested positive for morphine. K.S. was taken into protective custody. Mother and Father were unmarried and both had unresolved drug abuse issues.

The Orange County Social Services Agency (SSA) filed a petition. It alleged Mother's drug screen at the hospital was positive for benzodiazepine and opiates. Mother admitted lying about her pregnancy to be given Xanax, even after being advised by a physician to discontinue using the drug. She also ingested Oxycontin without a prescription during her pregnancy. K.S. lost a lot of weight due to Mother's drug use. The petition alleged Father had a history of substance abuse and a criminal arrest history for drug-related offenses. Both parents pled no contest to the petition. The court

¹ All further statutory references are to the Welfare and Institutions Code.

sustained the petition, declared K.S. a dependent child of the court, and granted the parents reunification services.

K.S. was first placed with a maternal aunt, where she suffered terribly from drug withdrawal symptoms. In January 2011, she was moved to live with a maternal cousin (Susan). Both parents initially visited K.S. quite frequently and stated they were willing to do whatever was needed to reunify with her. The visits were reported to be positive. At the time, Mother and Father were living together in an apartment.

A social worker interviewed Father, who admitted he began using drugs when he was 13 years old. He was raised in New York, and his family still lived on the East Coast. Father stated he had it “pretty rough” growing up, he had issues with depression, and he attempted suicide as a teenager. Father stated he self-medicated with cocaine, heroin, and Xanax to deal with his depression.

Mother also admitted she was addicted to drugs and she needed help. She entered a detoxification center, but the counselor soon became concerned about Mother after she missed drug tests and tested positive for opiates on a few occasions. Mother was on a waiting list to move to a substance abuse rehabilitation center.

Father only lasted two weeks in his first drug treatment program. He was discharged after refusing to drug test or attend the required activities. Father admitted he was using drugs but said he was willing to go into treatment again. Yet, Father did not use any of the social worker’s many referrals to treatment programs.

In early February 2011, the social worker prepared a report for the six-month review hearing. She recommended the court terminate reunification services and schedule a permanency planning hearing. The hearing was continued and the social worker filed an addendum report on March 15, 2011. However, her recommendation remained the same. She noted Father had entered a detoxification facility and had stayed in the program until he was discharged to a sober living home. He lived at the home until the end of February, and he then moved to the Third Step House residential substance

abuse program. Father told the social worker he could stay in this treatment program for one year and continue working full time. He had found full-time employment as a telemarketer.

At the six-month review hearing held on March 15, the court terminated Father's reunification services but continued services for Mother. The court strongly urged Father to continue on the path of becoming clean and sober. It stated, "Because of the young age of your child we can't be on your timeline. You need to do it in your time period, but you've got a beautiful baby here and we cannot wait for that, so we as a court go forward and proceed in [K.S's] best interest"

In a report prepared in July 2011, for the 12-month review hearing, the social worker recommended the court terminate Mother's reunification services and schedule a permanency planning hearing. The social worker reported K.S. was "connected" to Susan, who was interested in providing a permanent home. K.S. (now 11 months old) suffered some developmental delays. She could not crawl, she had trouble sitting up, and her speech was delayed. She received physical and occupational therapy three to four times a week.

The social worker reported Mother was still struggling with her substance abuse issues. She had not completed a parenting education class and had missed substance abuse tests. She told a counselor she was not ready to have K.S. back in her care.

The social worker reported Father was still residing at the Third Step House. He was participating in the program. However, he also had been charged and was on trial for forgery and second degree burglary. He and Mother were still a couple but were no longer living together.

The parents had supervised visits with K.S. once a week for up to four hours. The social worker reported the parents could not visit K.S. more often due to their work schedules. The social worker reported the parents' participation during visits was

“moderate.” They often took breaks to smoke and had some difficulty because K.S. was “demanding.” Susan had to provide everything for the visits because Mother and Father rarely brought food or diapers.

The 12-month review hearing was continued to August 2011. The social worker filed an addendum report noting Mother had missed two drug tests and was having seizures at her job. Mother was often late for or cancelled visits with K.S.

Susan reported K.S. was having a very difficult time during the visits. She was crying out and becoming agitated with both parents. Susan had to intervene to calm the child. The parents depended on Susan to bring everything K.S. needed to the visits.

On August 17, 2011, the court terminated Mother’s reunification services and scheduled a permanency planning hearing for December 14. In a report prepared for the hearing, the social worker opined K.S. was adoptable. She was described as a bright child with blond hair and brown eyes. Although the now 17-month-old child had many developmental and motor skill concerns, she was “stable in the care of [Susan].” K.S. appeared to be happy and thriving with Susan, who had been very consistent in taking K.S. to regional center services three to four times a week. K.S. loved for Susan to hold her. Susan and her fiancé wished to adopt K.S.

The social worker reported K.S. was still having difficulties after visits with her parents. “She ha[d] to be held and carried for long periods by the caregiver after the visits. She becomes very irritable and cries and many times [has] difficulties calming down after the visits. She also gets overtired and continually wishes for the caregiver to hold her and comfort her.” The visits were described as “very routine and consist[ed] of the [parents] playing and interacting with the child. [The parents] continue to have many difficulties accepting that the child is so developmentally delayed.”

The hearing was trailed to December 19, 2011. On that day, Father filed a 388 petition. Father declared his “sincere desire to be a pivotal part of [his] daughter’s life” led him “to sobriety on a continuous basis” since February 14, 2011. Father stated

he was committed to rehabilitation at the Third Step House for the past 10 months. He had a full-time job. He attended Alcoholics Anonymous (AA) meetings and weekly “detox” counseling sessions. Father stated his visits with K.S. were positive. She would smile and was excited to see him. Father stated he gave K.S. praise and rewards to encourage her to take her first steps. Father noted his family had traveled from the East Coast to be a part of K.S.’s life. He was worried Susan’s recent habit of cancelling visits hurt his relationship and bond with K.S. Father stated he had learned a lot from parenting classes and that he could now provide K.S. with a safe environment.

The court heard argument as to whether it should hold an evidentiary hearing on Father’s petition. SSA argued Father had failed to present any real evidence of his sobriety or how he could serve K.S.’s best interests. K.S.’s counsel agreed. The court determined Father had failed to establish a prima facie case and denied Father’s petition.

The permanency planning hearing was continued to March 2012. The social worker filed an addendum report describing in greater detail Father’s visits in January and February 2012. For example, the social worker stated that on January 5, 2012, Father came to the visit alone. K.S. had a low grade fever due to teething. Father played with K.S. for approximately 30 minutes, and then spent the remaining 30 minutes videotaping the child playing with Susan. Father did not bring food, drinks, or toys for K.S.

Father came alone to his next scheduled visit on January 7, 2012. Father engaged and played with the child for two hours. Susan had to give the child “a lot of reassurance” during the visit because K.S. wanted to go back to Susan. Father returned in the afternoon for a second visit. He brought his brother to meet K.S. Because K.S. did not know her paternal uncle, she began to cry and did not want to participate in the visit. The visit got better when Susan, Father, and his brother walked over to a park where they played with K.S. Again, Father did not bring food, drinks, or toys for K.S.

On January 12, 2012, Father and Mother visited the child for one hour. K.S. was very “cranky,” but she played and interacted with her parents. The parents did not bring food, drinks, or toys for K.S. at this visit or the next one on January 14. At that visit, the parents arrived late and K.S. only wanted to play for a short time because she did not feel well. Father returned for a second visit in the afternoon, but it had to be ended because K.S. was not feeling well.

The following week, on January 21, the parents visited for two hours in the morning and two hours in the afternoon. They played with K.S. but caused her to become upset when they built towers with blocks that were too high for K.S. to reach. K.S. became upset and cried because the towers would fall. The parents laughed and giggled about this and K.S. became very upset. Susan eventually told the parents to stop building the block towers. The parents did not like being redirected. The parents had not brought any of their own food, drinks, or toys for K.S.

The next visit on January 28, 2012, did not go well. K.S. was upset and did not want to visit with her parents. She continued to run back and forth between Susan and her parents. Mother handed K.S. a cell phone because K.S. would not interact with her. Father sat and watched K.S. play with the cell phone. When the parents returned in the afternoon for a second visit they “engage[d] with the child during this time but did not want to [use sign language] with the child.” Due to her developmental delays, K.S. used signing as a way to communicate with everyone. Both parents got upset and angry because they did not want to sign with K.S., who in turn became very upset because her parents were not signing to communicate with her. She cried and walked over to Susan. During this visit, Father raised his voice and told K.S., “[Y]ou need to start talking, when are you going to start talking.”

At the next visit on February 4, 2012, Susan told both parents that they needed to sign with K.S., rather than ask her to speak, because that was how K.S. liked to communicate. The parents became upset when Susan told them this. K.S. was very

upset during the visit and needed constant reassurance from Susan. Father tried to distract the child by turning the lights on and off. The parents left the visit feeling frustrated.

As was their habit, the parents did not bring food, drinks, or toys for K.S. to any of the February visits. Most of the visits went well, and the parents interacted with K.S. However, on February 11, Susan told the social worker that Father allowed K.S. to walk and jump on the couch. Susan stopped Father from doing this because she felt K.S. could have been hurt. Father got very frustrated with Susan's admonishment but continued to play with K.S. During the afternoon visit, Mother took pictures of the child, which upset her. K.S. tried to avoid Mother. During this visit, Father sat on the couch and did not interact with K.S.

The social worker concluded her report by noting Father had only asked Susan one time to come to medical or therapeutic visits. He had not asked the social worker for permission to attend appointments. When K.S.'s paternal grandmother was visiting, she went with Susan to some appointments. Susan claimed she never told Father he could not attend medical or therapeutic visits.

On the day of the permanency planning hearing (March 12, 2012), Father filed another 388 petition. The court found he had established a prima facie case and scheduled a hearing for April 10, 2012. Father's petition requested the court place K.S. in Father's home with family maintenance supervision. Alternatively, Father requested the court order long-term foster care and a placement review in 90 days after a liberalization of visitation. Father declared he had completed the court ordered service plan. He completed parenting classes, had been clean and sober for over a year, had suitable housing for K.S., and was employed full time as a telemarketer earning approximately \$400 a week.

Father explained that after achieving one year of sobriety, he became eligible to move out of the residential treatment program (the Third Step House) and find

a home for himself and K.S. While living at the Third Step House, Father was required to test regularly, attend AA meetings, attend “detox” four times a week, and follow the strict house rules. He was now renting a three-bedroom home he shared with two women. He had furniture, clothes and toys ready for K.S. In addition, he planned to use one of the daycare centers near his home to care for K.S. while he was at work or, alternatively, make an arrangement with Susan (who he knew K.S. loves).

Father discussed his regular and consistent four-hour monitored visits with K.S. each week. He stated there was a significant father/daughter bond and visits were the “highlight” of his week. He described many of the activities he and K.S. engaged in during visits. He opined, K.S. “clearly enjoys and obviously feels comfortable with me feeding her, she sits on my lap and we play ball . . . which she really loves. She looks to me for attention and guidance. She seeks me out for comfort. She is excited and giggly as soon as she sees me because she enjoys being with me so much.”

Father acknowledged some visits had been difficult because Susan was the monitor and it confused K.S. Father stated SSA had denied his requests to increase or lengthen visits. The only visits he missed were because Susan cancelled them. He claimed to have brought diapers, wipes, toys, books, clothes, and food on numerous occasions to the visits. He explained, “Unfortunately, this never gets reported because [Susan], who wants to adopt [K.S.], monitors the visits and makes the reports to the [s]ocial [w]orker. In addition, I have repeated[ly] offered to provide additional supplies of the above-mentioned things to the caretaker. She always refuses.” Finally, Father concluded it would be in K.S.’s best interests to be in the home of “her stable, sober biological father who will love her and care for her like no one else can.”

On April 10 and 11, 2012, the social worker submitted addendum reports. Susan told the social worker that Father and Mother had resumed living together until mid-March. While they were living together, Mother was openly using drugs, which eventually prompted Father to move out. Susan told the social worker that she mentioned

to Father that one of the reasons visits were monitored was because Mother often appeared to be under the influence of drugs and it was not safe for her to visit K.S. alone. Father told Susan he now understood why it was not safe to visit while under the influence, but he did not give her any reason why he allowed Mother to visit K.S. when they were living together and she was using drugs.

Since the last hearing, both parents had visited K.S. together four times in March. Father began visiting K.S. alone after March 23. He cancelled a planned visit on March 30. Susan told the social worker that visits are still difficult for K.S. During visits, the child would be very clingy and needed to be reassured by Susan. After visits, K.S. was always very upset and often times cried and appeared to be agitated.

The social worker spoke to the sober living home manager at Third Step House. The manager stated Father lived there up until two months ago when he needed to establish residence elsewhere. The manager clarified Third Step House is not an outpatient substance abuse treatment program. It is a sober living home for indigent alcoholics and substance abuse addicts. To stay in the program, participants have to attend at least 11 AA meetings a week and be searching for employment or working full time. Participants only randomly drug tested once a month.

The social worker noted that if Father had attended an outpatient substance abuse program he would have seen an individual counselor at least once a week, attended group counseling one-to-two times per week, and drug tested two-to-three times a week. The social worker stated if Father had participated in this kind of a program for up to one year he could have been allowed unsupervised visitation. She noted Father's visits were consistent but "at best adequate. [Father's] visits . . . have always been monitored. Until recently, [Father] was visiting with the mother and had never interacted with the child on his own alone. [¶] The father is a 'friendly' visitor." In addition, the social worker noted it appeared K.S. tolerated Father's visits, but she was often clingy with Susan. Many times Susan would intervene during the visits. K.S. (now two years old) had

significant developmental delays and still did not speak but communicated by using sign language. Father appeared frustrated by this and would ask K.S. when she was going to speak. The social worker opined, “It is this kind of interaction . . . [that is] detrimental for her. [Father] seems to lack the understanding of developmental delays yet he continues to interact with the child in an inappropriate manner.”

The hearing was continued again to April 17, 2012. The social worker’s addendum report recounted a telephone message Father left with her supervisor. Father accused the social worker of being biased, of failing to visit the sober living home, and of having ““counter transference issues”” towards him. Father stated he learned the social worker’s father died of a heroin overdose, and he attributed her issues to this fact. The social worker denied being biased or having any transference issues. She stated the allegations made by Father were not true, and she never disclosed any personal information about herself to Father.

In April 2012, the court held a hearing to consider Father’s 388 petition and to conduct the permanency planning hearing. The court heard testimony from Father, who stated he had been sober since February 2011. He testified the sober living house offered drug testing and counseling. Father stated he was participating in other group meetings in addition to AA meetings. He volunteered at a drug detox center. Father complained he was not given certain make-up visits with K.S. He estimated Susan’s cancellations had deprived him of about seven total weeks’ worth of visits.

Father testified he played with K.S. during visits and he did not bring her toys because she already had so many. He believed K.S. was excited to see him. Father stated K.S. did not want visits to end, but she willingly went to Susan at the end of visits. Father testified he was aware of K.S.’s delays and he had asked to attend some of her appointments. He claimed he was not approved to attend appointments and Susan told him that his presence would distract K.S. Father admitted he did not ask for increased visitation until February 2012.

Father conceded he lived with Mother for one week in March 2012, just before the permanency planning hearing. He denied knowing Mother was using drugs, but admitted she was a trigger for his own drug issues. Father believed the Third Step House manager gave the social worker incorrect information about that program. Although he had only attended a total of two counseling sessions, he met weekly with the Third Step House manager who was a certified drug counselor. Father asserted he had a strong bond with his daughter and he could take care of her better than Susan. He disputed Susan's reports that she had to intervene or redirect his interactions with K.S. during visits. He claimed all his interactions with K.S. were fine.

The court considered argument from all the parties. SSA and the minor's counsel argued the petition should be denied. During Father's counsel's argument, the court questioned his claim to have complied with the counseling component of his case plan. Counsel argued Father received all the counseling he needed to obtain sobriety in the sober living house and through the AA meetings. The court stated it appeared all Father's counseling dealt with drug abuse but not with the issues underlying why Father initially started taking drugs. The court clarified it understood Father had received counseling about the triggers that would cause him to relapse, but it questioned if Father was counseled to address the issues that "started him down this [path] so many years ago?" Father had not received this type of counseling.

After considering argument from counsel, the court denied Father's 388 petition. The court stated it was not enough for a parent to show a genuine change of circumstances and that a parent also had the burden of proving a change in court orders would be in the child's best interests. The court stated at this stage of the proceedings, the best interests of the child takes into consideration the child's emotional attachment and bond to the parent.

The court stated Father did not start working on his sobriety until one month before his services were terminated. The court noted Father never completed his

case plan and never progressed to unmonitored or overnight visits. In addition, the court found relevant the fact Father has had three different residences in the past three months and he continued to associate with Mother, who is not drug free and who could trigger a relapse. The court concluded Father had not been sober for very long, he could not show drug testing “with any regularity,” and there was not enough evidence of a relationship between Father and K.S.

The court then held the permanency planning hearing and considered further argument from the parties. The court determined K.S. was adoptable and it would be in her best interests to be adopted. The court terminated parental rights and determined K.S. would be placed for adoption. It found no exceptions to the termination of parental rights applied.

III

A. *The 388 Petition*

Father maintains the court abused its discretion in denying his section 388 petition because he demonstrated changed circumstances and that he could offer his daughter a stable environment. Father also asserts the court misapplied the applicable standard set forth in *In re Kimberly F.* (1997) 56 Cal.App.4th 519 (*Kimberly F.*).

Section 388 provides, in relevant part: “Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstances or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made” (See also *In re Brandon C.* (1993) 19 Cal.App.4th 1168, 1172; Cal. Rules of Court, rule 5.570(f).) “Section 388 provides the ‘escape mechanism’ . . . built into the process to allow the court to consider new information. [¶] . . . Even after the focus has shifted from reunification, the scheme provides a means for the court to address a legitimate change of circumstances [¶] . . . [T]he Legislature has provided the procedure pursuant to section 388 to accommodate the possibility that circumstances may change after the

reunification period that may justify a change in a prior reunification order.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) That being said, “[i]t is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child.” (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 529; § 388, subd. (b).)

As noted by Father, some of the factors that a court should consider were articulated by the court in the *Kimberly F.* case. That court ruled three factors that “provide a reasoned and principled basis on which to evaluate a section 388 motion” include: “(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to both parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been.” (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.)

However, the above list is not exhaustive and in some case the court may recognize when the child’s best interests is the ultimate question. As noted in one treatise, the *Kimberly F.* approach may not be appropriate when a change of placement is sought after the court has terminated reunification services with the child’s parents. (Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2012 ed.) Supplemental and Subsequent Petitions, § 2.140[5], p. 2–422.) After services have terminated, “the focus shifts to the needs of the child for permanency and stability’ [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. [Citation.] A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child.” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*)). Here, the motion for a change in placement and additional services (meaning further delay in finding a permanent home) was made on the eve of the permanency planning hearing. We agree that in such circumstances, the approach of

Kimberly F. may not be sufficient as it fails to give full consideration in this shift in focus to the goal of assuring stability and continuity, i.e., the child's best interests at this stage of the proceedings.

In any event, "the burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that there are changed circumstances that make a change of placement in the best interests of the child." (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) "Whether a previously made order should be modified rests within the dependency court's discretion, and its determination will not be disturbed on appeal unless an abuse of discretion is clearly established." (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685 (*Amber M.*); see also *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319.) Accordingly, we will not reverse a juvenile court's denial of a 388 petition "unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]." (*Id.* at p. 318.) "It is rare that the denial of a . . . 388 motion merits reversal as an abuse of discretion." (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 522.)

B. Analysis

The juvenile court did not abuse its discretion when it denied Father's 388 petition filed on the same day as the scheduled permanency planning hearing. The evidence indicated Father had an extensive drug history dating back to when he was a young teenager. Father used drugs as a way of coping with depression. Father claimed he had been drug free since February 2011 based on his residence in a sober living facility. He asserted his 15 months of sobriety, full-time employment, and residence justified a finding there had been a change in circumstances. He complains the trial court

improperly focused on the fact his visitation remained monitored and he did not start working on his addiction until just before reunification services were terminated. In addition, he asserts it was an abuse of discretion for the court to focus on his lack of counseling (a requirement of his case plan) as a necessary component of substance abuse rehabilitation. Father concludes he “substantially complied with his case plan” and the court provided “no rationale for why additional therapy was also necessary for [his] recovery.”

Moreover, Father contends that due to K.S.’s young age, she does not understand the process of adoption, that it could be postponed, or the significance of long-term foster care. He maintains granting the petition would have allowed K.S. “to remain in the same placement and would benefit her by allowing additional time to visit her father and an evaluation whether he was ready for actual placement in his care.” In essence, Father is asserting on appeal that K.S.’s best interests would be served by postponing her adoption and authorizing renewed placement efforts with SSA’s oversight. He appears to have abandoned on appeal his claim to be ready for immediate placement with K.S.

If we assume, without deciding, Father showed a change in his circumstances, we nevertheless conclude it was not an abuse of discretion in this case for the court to deny Father’s petition based on its conclusion it would not be in K.S.’s best interests. Father’s briefing contains very little about the second requirement for his 388 petition, i.e., would modification be in K.S.’s best interests. As noted above, “It is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child.” (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 529.)

On this issue, Father asserts he had a positive relationship with K.S. and they shared a bond because of his consistent presence in her life through weekly visits. Father complains his efforts to become more involved in her life were complicated by

Susan cancelling visits and by Susan's failure to encourage him to attend K.S.'s therapeutic appointments.² In raising this criticism, Father has acknowledged the parent/child bond could be stronger and that he should be better informed about K.S.'s medical needs. Father's solution for this shortcoming is for the court to restart reunification services and permit more frequent visitation.

We conclude Father misunderstands that at this stage of the proceedings the issue is not whether theoretically (given enough time) he could eventually assume a daily parental role in K.S.'s life. Rather, the issue is whether it would be in K.S.'s best interests to delay her adoption by Susan after she has waited two years for permanency and stability in her life. As to this issue, Father's argument is weakly based on his notion that being with a biological parent in the long run would be better for K.S. than being adopted by Susan. We disagree.

While there is no doubt K.S. feels a connection to Father, it is also very clear that currently the most important adult in K.S.'s life is Susan. K.S. has not spent more than a few hours with Father each week, and they have never spent time alone. During visits, K.S. relied on the security of knowing Susan was also in the same room for the monitored visits. It was reported K.S. often sought reassurance from Susan during visits and in recent visits had the tendency to cling to Susan. When Mother or Father caused K.S. to become upset or frustrated, K.S. would seek comfort from Susan (who would make things better by telling the parents to stop their inappropriate behavior.) After distressing visits, Susan would hold K.S. and help her become calm. By all accounts K.S. was strongly bonded to Susan, who stood in a parental role. K.S. primarily

² We agree with SSA that any complaints about the caretaker's behavior should have been raised during the dependency proceedings (and long before the permanency planning hearing) through a 388 petition to modify the visitation order. (*In re Moriah T.* (1994) 23 Cal.App.4th 1367, 1377 [if agency is abusing its responsibility in managing details of visitation, parent or guardian may bring that matter to attention of juvenile court by way of a 388 petition to modify visitation order].)

relied on Susan for her physical needs and for love, security, comfort, and support. The record amply supports the trial court's finding there was not sufficient evidence of the kind of relationship between Father and K.S. that would justify any further delays as being in K.S.'s best interests.

Father's suggestion that delaying adoption will not negatively effect K.S., because she is too young to understand the court's available legal options, runs contrary to the entire statutory scheme. For young children such as K.S., the Legislature has expedited permanency. The presumptions in favor of reunification expired at the six-month review hearing when Father was still abusing drugs and refusing drug tests or to otherwise to comply with his case plan. As noted by the trial court, Father's request for additional visitation and services will only further delay K.S.'s chance for permanency and stability. The bottom line is Father's change of circumstance with sobriety did not bring him close enough to being ready for placement with K.S. due to the very limited role he has played in her life for the past two years. On the eve of the permanency planning hearing, the court did not abuse its discretion in ruling two-year-old K.S.'s best interest was to be adopted by Susan, who has stood in a loving parental role for most of K.S.'s life, and can provide her with the stability and permanency she deserves.

C. Termination of Parental Rights

Father asserts that if this court reverses the denial of his 388 petition, it must also void the order terminating his parental rights to provide him with effective relief. Alternatively, Father argues the termination order should be reversed because substantial evidence supported application of parent/child relationship exception (§ 366.26, subd. (c)(1)(B)(i)), to termination of his parental rights. He loses on the first argument because we have affirmed the ruling on the 388 petition. We also conclude his second contention lacks merit.

At a permanency planning hearing, the juvenile court determines a permanent plan of care for a dependent child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50.) Adoption is the permanent plan preferred by the Legislature. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573 (*Autumn H.*)). An exception to the adoption preference occurs when termination of parental rights would be detrimental to the child because the parent has “maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) The parent bears the burden of proof on both these prongs: (1) that visitation was consistent and regular; and (2) that the child would benefit from continuing the relationship. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1253.)

Father satisfied the first prong of the parental benefit exception with regular and consistent visitation. Nonetheless, we cannot say the juvenile court erred by concluding the exception did not apply because the second prong was not met.

To overcome the benefits associated with a stable, adoptive family, the parent seeking to invoke the section 366.26, subdivision (c)(1)(B)(i), exception must prove that severing the relationship will cause not merely some harm but substantial harm to the child. (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853.) Similarly, “the exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348 (*Jasmine D.*)).

In *Autumn H.*, *supra*, 27 Cal.App.4th at page 575, the court articulated a test for determining whether a child would benefit from continuing a relationship with the natural parent. To succeed under this test, the parent must establish “the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” In evaluating this issue, the court must “balance[] the strength and quality of the natural parent/child

relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid.*) "The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond[, including t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs" (*Id.* at pp. 575-576; see also *In re Angel B.* (2002) 97 Cal.App.4th 454, 467.)

"[P]leasant and cordial . . . visits are, by themselves, insufficient to mandate a permanent plan other than adoption." (*In re Brian R.* (1991) 2 Cal.App.4th 904, 924.) "[F]requent and loving contact" may also be insufficient to establish the type of beneficial relationship "contemplated by the statute." (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418 (*Beatrice M.*)). "Interaction between [a] natural parent and child will always confer some incidental benefit to the child[,]" but the basis of a beneficial relationship is that the parents have "occupied a parental role." (*Id.* at p. 1419.) "While friendships are important, a child needs at least one parent. Where a biological parent . . . is incapable of functioning in that role, the child should be given every opportunity to bond with an individual who will assume the role of a parent." (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

Whether we apply the abuse of discretion standard or the substantial evidence standard (see *Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351 ["practical differences between the two standards of review are not significant"]), the result on appeal is the same. Substantial evidence supports the juvenile court's conclusion termination of parental rights would not cause the child detriment because Father has failed to demonstrate the benefit K.S. would receive from maintaining their relationship outweighs the benefits she will gain in a permanent home with an adoptive parent. (See

Autumn H., *supra*, 27 Cal.App.4th at p. 574 [parent bore burden of establishing termination of parental rights would greatly harm child]; accord *Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

Father contends the evidence demonstrates K.S. would benefit from continued contact with him given they had positive visits and he felt they shared a strong bond and a significant relationship. Father asserts he appropriately cared for K.S., and she appeared to enjoy the visits. But a successful parental benefit exception claim rests not on whether the parent/child contacts “confer some incidental benefit to the child[,]” but on whether the person “occupied a parental role” in the child’s life. (*Beatrice M.*, *supra*, 29 Cal.App.4th at pp. 1418-1419.) As SSA aptly noted, at best Father established he had pleasant contacts with a child for whom he never provided primary care, and with whom he never progressed to unmonitored contact.

In re Jerome D. (2000) 84 Cal.App.4th 1200 (*Jerome D.*), and *Amber M.*, *supra*, 103 Cal.App.4th 681, illustrate the compelling evidence necessary to establish the benefit exception. In *Jerome D.*, the child “seemed lonely, sad, and . . . ‘the odd child out’” in his placement. He wanted to live with his mother and had enjoyed unsupervised night visits in her home. (*Jerome D.*, *supra*, 84 Cal.App.4th at pp. 1206-1207.) A psychologist opined the child and his mother “shared a ‘strong and well[-]developed’ parent-child relationship and a ‘close attachment’ approaching a primary bond.” (*Id.* at p. 1207.) The court concluded keeping parental rights intact would prevent the child’s “position as the odd child out in [placement] from becoming entrenched by a cessation of visits and the loss of his mother while [his half-siblings] continued to enjoy visits and remained [the mother’s] children.” (*Id.* at p. 1208.)

In *Amber M.*, *supra*, 103 Cal.App.4th at page 690, the court reversed termination of parental rights where a psychologist, therapists, and the court-appointed special advocate uniformly concluded “a beneficial parental relationship . . . clearly outweigh[ed] the benefit of adoption.” Additionally, two older children had a “strong

primary bond” with their mother, and the younger child was “very strongly attached to her.” (*Ibid.*) If the adoptions had proceeded, the children would have been adopted in separate groups. (*Id.* at pp. 690–691.)

Here, Father did not demonstrate harm would have ensued from termination of parental rights similar to that demonstrated in *Amber M.* or *Jerome D.* At the permanency stage, the bond the child shares with the parent and the harm that might arise from terminating parental rights must be balanced against what is to be gained in a permanent stable home, and “it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.) The parental benefit exception will apply only where the parent has demonstrated the benefits to the child of continuing the parental relationship outweigh the benefits of permanence through adoption.

K.S. was a newborn when she was taken into protective custody due to the long-term drug abuse by both her parents. She was two years old when parental rights were terminated. K.S. had lived apart from Father for her entire life and for most of the dependency period relied on Susan to meet her daily needs. Although Father claims to have achieved long lasting sobriety, his limited time with K.S. was never unmonitored. Susan or Mother was always there to assist him with K.S. Moreover, the record reflects that while some visits were enjoyable, many caused K.S. to be frustrated or upset. In part this was due to Father’s difficulty understanding and responding to K.S.’s developmental delays. Often Susan would have to comfort K.S. after she had difficult visits.

Father points to nothing in the record indicating that any benefit K.S. might gain by continuing her relationship with Father was outweighed by “the well-being [K.S.] would gain in a permanent home with new, adoptive parents.” (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575). Accordingly, we conclude the juvenile court did not abuse its discretion by concluding the parental benefit exception did not apply.

Father's related contention the juvenile court should have ordered a permanent plan of guardianship is misplaced. He asserts such a plan would provide K.S. with stability while still allowing him to maintain parental contact through visitation. As noted in *Beatrice M.*, *supra*, 29 Cal.App.4th at page 1419, "The Legislature has decreed . . . guardianship is not in the best interests of children who cannot be returned to their parents. These children can be afforded the best possible opportunity to get on with the task of growing up by placing them in the most permanent and secure alternative that can be afforded them. In decreeing adoption to be the preferred permanent plan, the Legislature recognized that, 'Although guardianship may be a more stable solution than foster care, it is not irrevocable and thus falls short of the secure and permanent placement intended by the Legislature.' [Citation.]" We find no error.

IV

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.